IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE OF THE STATE OF CALIFORNIA	)	2d Crim. B206146
Plaintiff and Respondent,	)	
	)	(Sup.Ct.No. BA328916)
v.	)	
ADAM FOSTER,	)	
Defendant and Appellant,	)	

APPEAL FROM THE JUDGMENT OF
THE SUPERIOR COURT OF LOS ANGELES COUNTY
THE HONORABLE CHARLES F. PALMER, JUDGE

APPELLANT'S REPLY BRIEF

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ARGUMENT

CONTRARY TO THE SUPERIOR COURT'S OPINION, THIS WAS NOT A "CLOSE CASE" – GIVEN THE UTTER LACK OF REASONABLE SUSPICION THAT APPELLANT WAS ARMED, THE EVIDENCE CLEARLY SHOULD HAVE BEEN SUPPRESSED AS THE FRUIT OF AN UNCONSTITUTIONAL PATDOWN SEARCH.

Respondent cites all the usual factors, the same cited by Superior Courts and Courts of Appeal repeatedly in thousands of post-911 cases – it was dark, it was a high crime area and the suspect was wearing baggy clothing. (RB pp. 7 - 10.) Respondent even relies on a recent opinion from Division Six of this appellate district that specifically says that police can patdown any suspect wearing baggy clothing when investigating a drug offense. (RB p. 9.10.) Nothing cited by respondent, however, changes the fact that Officer Williams specifically testified that appellant did nothing to cause the officer to believe appellant was armed. (R.T. p. 12.)

A. Without A Doubt, The Patdown In This Case Ran Afoul Of The Principles Of Terry v. Ohio And Its Progeny.

To begin with, appellate counsel in this case was counsel in *People v. Collier* (2008) _ Cal.App.4th _ [2008 DAR 14663] and intends to file a petition for review in *Collier*. Even if *Collier* remains good law by the time this Court issues its opinion, there is a key factual difference between the pre-patdown situation in *Collier* and in this case. In *Collier,* the police suspected that there was marijuana in the car and,

therefore, had probable cause to search the car. Here, the police were only investigating a minor traffic infraction – namely riding a bicycle at night without a headlight. While people involved in drug offenses may often be armed, the same blanket statement cannot be said of those who ride a bicycle without a headlight. By Officer Williams' own admission, such an offense is not an inherently violent crime. (R.T. pp. 7 - 8.) Even Division Six said that police cannot patdown everyone wearing baggy clothing. Only baggy clothing coupled with other suspicious circumstances warrants a patdown. (RB p. 9; see also *People v. Lopez* (2004) 119 Cal.App.4th 132, 137.) There were no other such circumstances.

Counsel would next point out that nowhere in respondent's brief is it mentioned that Officer Williams specifically testified that appellant did nothing to cause the officer to believe he was armed. Rather, the officer just assumed, for safety purposes, that appellant was armed. (R.T. p. 12.) In other words, the officer believes he has the unfettered right to routinely patdown anyone he stops, even if it is for a minor traffic infraction, if the stop occurs at the infamous intersection of Florence and Normandie. This is simply not the current state of the law. Mere presence in a high crime area is insufficient to create a reasonable suspicion that the person is armed and dangerous. (See *People v. Garry* (2007) 156 Cal.App.4th 1100, 1111 - 1113.) Something more was needed to furnish reasonable suspicion for a patdown in this case. Unfortunately, Officer Williams' standard practice of conducting an immediate patdown when the stop occurs in

this high crime area prevented the officer from possibly discovering that something more.

Again, the phrase "officer safety," however, is not an elixir that magically transforms an otherwise unconstitutional search into one that is constitutionally acceptable. When "officer safety" is the asserted justification for a warrantless patdown, the Fourth Amendment still requires that the search only be upheld if the officer testifies to "specific and articulable facts"; i.e., facts which support a conclusion that he had reasonable cause to suspect the individual was armed and dangerous. The requirement that the police testify to specific, articulable facts as the basis for their reasonable suspicion that a particular suspect was armed and dangerous is the only thing that prevents the police from having carte blanche to search everyone they stop in the name of "officer safety." Even Division Six in *Collier* did not go that far.

In this case, there is no evidence which supports the conclusion that Officer Williams and his partner reasonably believed that appellant was armed and dangerous. While many courts have recognized that "officer safety" is a legitimate factor weighing in favor of a warrantless search, the United States Supreme Court has set forth a clear standard which an officer must satisfy before patting down a detainee. Even in this post-9/11, security above all else, era, if a police officer does not have a reasonable suspicion that the particular detainee is armed and dangerous, he cannot constitutionally pat him down. (*Terry v. Ohio* (1968) 392 U.S. 1, 27 - 29 [20 L.Ed.2d 889, 88 S.Ct. 1868].)

B. The Pipe Was Discovered As The Result Of The Pending Patdown And, Therefore, Did Not Transform The Patdown Which Followed Into An Arrest That Had Not Been Made.

Apparently realizing the weakness of her argument that the patdown in this case was constitutionally permitted solely because of the area of the stop and that appellant was wearing baggy clothing, respondent also argues that the evidence was admissible as the product of a search incident to an arrest that had not yet been contemplated. There are several flaws with this argument.

First, just having probable cause to arrest does not give police the authority to conduct a search incident to that arrest. The United States Supreme Court's unanimous decision in *Knowles v. Iowa* (1998) 525 U.S. 113 [142 L.Ed.2d 492 119 S.Ct. 484] makes it abundantly clear that an officer cannot conduct a search incident to merely issuing a traffic citation. Further, the Court held that it is not enough that the officer could have arrested, there actually has to be an arrest before there is a search. (*Id.,* at pp. 117 - 119.)

Second, "[i]t is axiomatic that an incident search may not precede an arrest and serve as part of its justification." (*Sibron v. New York* (1968) 392 U.S. 40, 63 [20 L.Ed.2d 917, 934, 88 S.Ct. 1889, 1902].) Thus, the fact the patdown turned up contraband cannot serve to justify the otherwise unconstitutional search. Since there was antecedent arrest, the search incident to a lawful arrest exception simply does not apply in this case. (See *Mapp v. Ohio*(1961) 367 U.S. 643, 649 [6 L.Ed.2d 1081, 81 S.Ct. 1684]

[absent a lawful arrest, police may not conduct a warrantless, full body, search of a suspect].)

Third, it is disingenuous to argue that the pipe was not the product of the patdown search. Officer Williams had already ordered appellant to get off his bicycle. As his partner went to patdown appellant, his partner asked if appellant had anything that was going to stick the officer. Appellant answered that he had a pipe. (R.T. p. 5.) Clearly, Williams' partner intimated to appellant that he was about to be patted down. To hold that appellant's truthful answer to this safety-related question negated his ability to subsequently challenge the validity of the imminent patdown would create the wrong incentive. Courts and law enforcement officers alike want suspects to truthfully answer questions designed to protect officer safety. Holding that appellant's truthful answer negated his ability to challenge the patdown would create a disincentive for suspects to answer such safety-related questions truthfully. Clearly, such a disincentive is in no one's best interest.

Finally, appellant had already submitted to a show of police authority when he got off his bicycle. His revelation that he had a pipe in his pocket, when asked by the officer if he had anything that might stick him, was also a submission to the officer's authority. As such, under *California v. Hodari D.* (1991) 499 U.S. 621 [113 L.Ed.2d 690, 111 S.Ct. 1547], appellant should not be held to have surrendered his privacy interest in the pipe he revealed to the officer. Appellant only did so because he was cooperating

with police and the only thing revealing the pipe did was prevent the officer from getting stuck – it did not reveal the existence of contraband the police would not have found otherwise. For these reasons, the search incident to arrest exception simply does not and should not apply in this case.

C. The Evidence Must Be Suppressed And Appellant's Conviction Reversed.

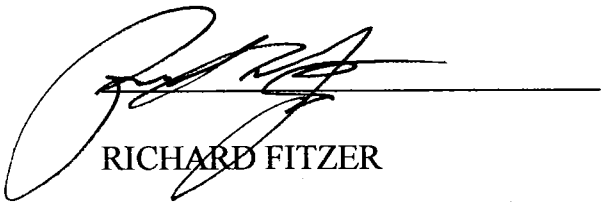
As the patdown search ran afoul of the Fourth Amendment, the fruits thereof, namely the drugs, should have been suppressed in accordance with the exclusionary rule. (*Mapp v. Ohio, supra,* 367 U.S. at p. 655; *Wong Sun v. United States* (1963) 371 U.S. 471, 485 - 488 [9 L.Ed.2d 441, 83 S.Ct. 407].) The Superior Court's failure to do so constitutes reversible error. When the reviewing court finds the search to be illegal, the judgment must be reversed and the cause remanded so that the defendant can be given the opportunity to withdraw his plea. (*People v. Ruggles* (1985) 39 Cal.3d 1, 13; *People v. Miller* (1983) 33 Cal.3d 545, 566 [the harmless error rule is inapplicable where the defendant has pled guilty following the erroneous denial of a motion to suppress].)

CONCLUSION

For the foregoing reasons, appellant respectfully requests this Court to find that the trial court erroneously denied his motion to suppress and, on that basis, reverse his conviction.

DATED: October 14, 2008

Respectfully submitted



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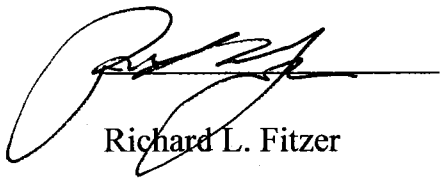
WORD COUNT CERTIFICATION

People v. Adam Foster

Court of Appeal No. B206146

I, Richard Fitzer, certify that this brief was prepared on a computer using Corel Word Perfect, and that, according to that program, this document contains 1,552 words.



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People v. Adam Foster **Court of Appeal No. B206146**

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PROOF OF SERVICE

I am a citizen of the United States, over the age of 18 years, employed in Los Angeles County with my business address as stated above. I am not a party to this case. On October 14, 2008, I served the **Reply Brief,** a copy of which is attached, by mailing a copy to each addressee named below by regular United States mail at Long Beach, California.

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I declare under penalty of perjury that the foregoing is true and correct. Executed October 14, 2008 at Long Beach, California.

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